LIBRARY
SUPREME COURT, U. S.

FILED
MAR 20 1975
MICHAEL RODAK, JR., C

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1026

EDWARD GIBSON, *Petitioner,*

v.

THE KROGER COMPANY, et al., *Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF RESPONDENT THE KROGER CO. IN OPPOSITION

CHARLES L. WHISTLER
MICHAEL R. MAINE
Baker & Daniels
810 Fletcher Trust Building
Indianapolis, Indiana 46204
Counsel for Respondent
The Kroger Co.

Central Publishing Company, Inc., Indianapolis, Ind. 46206

TABLE OF CONTENTS

	Page
Table of Authorities	ii
Opinions Below	1
Statute and Court Rules Involved	1
Question Presented	2
Statement of the Case	2
Argument	4
Conclusion	8
Appendix:	
42 U.S.C. § 2000e-5	9
Fed.R.Civ.P. 8(a), 12(b) and (h) and 41(b)	10

TABLE OF AUTHORITIES

Cases

	Page
Conley v. Gibson, 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957)	5
Foman v. Davis, 371 U.S. 178, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962)	5
Giancana v. Johnson, 335 F.2d 366 (7th Cir. 1964) *cert. denied* 379 U.S. 1001, 85 S.Ct. 718, 13 L.Ed.2d 702 (1965)	5
Joy v. Hague, 175 F.2d 395 (1st Cir. 1949), *cert. denied* 338 U.S. 870, 70 S.Ct. 147, 94 L.Ed. 534 (1949)	6
Love v. Pullman Co., 404 U.S. 522, 92 S.Ct. 616, 30 L.Ed.2d 679 (1972)	5
Marlowe v. Fisher Body, 489 F.2d 1057 (6th Cir. 1973)	6
Neagle v. Johnson, 381 F.2d 9 (8th Cir. 1967)	6

Statutes

28 U.S.C. § 1653	6
42 U.S.C. § 2000e-5	5, 7

Court Rules

Fed.R.Civ.P. 3	6
Fed.R.Civ.P. 7(a)	6
Fed.R.Civ.P. 8(a)	6
Fed.R.Civ.P. 8(h)	6
Fed.R.Civ.P. 12(b)(1) and (h)(3)	6
Fed.R.Civ.P. 15(a)	6, 7
Fed.R.Civ.P. 41(b)	6, 7
Fed.R.Civ.P. 60(b)(1)	7

TABLE OF AUTHORITIES—Continued

Secondary Authorities

	Page
1 CCH *Employment Prac. Guide* ¶¶ 2405, 2485 and 2545 (1972)	5
5 Wright & Miller *Fed. Prac. & Proc.: Civil* § 1202 (1969)	5
5 Wright & Miller *Fed. Prac. & Proc.: Civil* §§ 1206 and 1210 (1969)	5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1026

EDWARD GIBSON, *Petitioner,*

v.

THE KROGER COMPANY, et al., *Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF RESPONDENT THE KROGER CO. IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court for the Southern District of Indiana is unreported but appears at R. 236. The opinion of the Court of Appeals for the Seventh Circuit is reported at 506 F.2d 647. Copies of both opinions are attached to the Petition for Writ of Certiorari.

STATUTE AND COURT RULES INVOLVED

This case involves Title VII of the Civil Rights Act of 1964, § 705 (42 U.S.C. § 2000e-5) and Rules 8(a)(1),

12(b)(1), 12(h)(3) and 41(b) of the Federal Rules of Civil Procedure, the pertinent text of which are set forth at pp. 9-10 of this Brief (Appendix).

QUESTION PRESENTED

Whether the District Court erred in concluding that it was without jurisdiction of petitioner Gibson's action and in dismissing his Complaint without prejudice, when Gibson failed to allege pursuit or exhaustion of his Title VII administrative remedies and subsequently failed to amend his Complaint to add those necessary allegations, including his receipt of a belated right-to-sue letter, despite being on actual notice of such jurisdictional infirmities for five and one-half months.

STATEMENT OF THE CASE

On March 9, 1973, petitioner Edward Gibson ("Gibson"), commenced a civil action in the United States District Court for the Southern District of Indiana complaining that respondents The Kroger Co. ("Kroger") and the Bakery Workers Local No. 372-A of Indianapolis ("Union") had engaged in unlawful employment practices proscribed by Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.* (R. 4). The Complaint did not allege that Gibson had pursued or exhausted his state or federal administrative remedies prescribed by Title VII, did not plead any excuse for not exhausting those remedies, and did not allege the receipt of, or attach, a right-to-sue letter from the Equal Employment Opportunity Commission ("EEOC").

On April 30, 1973, the Union filed a Motion to Dismiss the Complaint for lack of jurisdiction over the subject matter and other reasons (R. 8), noting that:

> "Plaintiffs complaint fails to allege and attach as an exhibit, notice from the E.E.O.C. that the Commission has found probable cause to believe that a violation of Title VII has occurred. The complaint also fails to allege that a charge was filed within ninety days of the alleged unlawful employment practice." (R. 10).

On May 2, 1973, Kroger moved for dismissal of Gibson's action for, among other reasons, lack of subject matter jurisdiction (R. 16), noting that:

> "Plaintiff has not alleged that he has exhausted his administrative remedies under Title VII and has not alleged that the EEOC has issued a notice of right to sue. As a consequence, this Court lacks jurisdiction of the lawsuit, and plaintiff's action must be dismissed." (R. 30).

By Motion and Order of July 6 and 9, 1973, Gibson was granted an enlargement of time until August 15, 1973, to respond to the motions to dismiss. (R. 228 and 230). On August 22, 1973, Gibson filed an unverified legal memorandum in opposition to those motions (denominated "Answer to Defendant's Motion to Dismiss") which acknowledged that the items pointed out by defendants were jurisdictional prerequisites to a Title VII civil action, stated that they had been satisfied and attached a purported EEOC notice of right to sue dated August 20, 1973. (R. 231).

On October 15, 1973, the District Court granted Kroger's motion to dismiss for lack of jurisdiction, reasoning that Gibson "does not even allege in his complaint that he had previously filed notice with the EEOC, much less allege that he is about to receive notice from the EEOC of his right to sue." (R. 236, 238). Pursuant to Gibson's November 14, 1973, Notice of Appeal (R.

240), the United States Court of Appeals for the Seventh Circuit on November 21, 1974, affirmed the dismissal, declaring that, "Gibson's own course of conduct is responsible for his situation." (506 F.2d 647, 652).

Gibson now petitions this Court for a writ of certiorari to review the decision of the Court of Appeals. Kroger received its copies of Gibson's Petition on February 18, 1975.

Gibson's Petition presents a single question of law, *i.e.*, whether his unexcused failure to satisfy the jurisdictional prerequisites of a Title VII action required its dismissal and whether the Court of Appeals properly affirmed that determination of the District Court.

ARGUMENT

There are no sound reasons for this Court to exercise its discretion to review by writ of certiorari the decision of the Court of Appeals in this action. All this case involves is the dismissal of a civil action, *without* prejudice and *before* any limitations bar, because of Gibson's failure to allege pursuit and exhaustion of administrative remedies and to secure a right-to-sue letter from the EEOC (admittedly jurisdictional prerequisites to the action) despite a half-year's notice by Respondents setting forth the fatal defects in the Complaint. This case does not involve any "supertechnical" ruling by the Court of Appeals conflicting with decisions of this Court or other courts of appeal, with the spirit of the Federal Rules of Civil Procedure or with the policies of the Civil Rights Act of 1964. (Pet. 10).

Gibson's Complaint attempts to allege a claim for relief under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, *et seq.* That Act is grounded upon a procedure

which requires that such complaints be first heard by administrative agencies specifically established to resolve them. 42 U.S.C. § 2000e-5. Until a complainant has pursued these avenues of administrative relief and has secured an appropriate notice of right to sue from the EEOC, the federal courts do not have subject matter jurisdiction over the claim, and any action commenced before these administrative remedies are exhausted must be dismissed. *Love v. Pullman Co.*, 404 U.S. 522, 92 S.Ct. 616 at 617, 30 L.Ed.2d 679 (1972); 1 CCH *Employment Prac. Guide* ¶¶2405, 2485 and 2545 (1972).

Gibson's Complaint is devoid of allegations indicating either that he has sought and exhausted his administrative remedies or that the federal courts otherwise have subject matter jurisdiction over this case. Federal courts are presumed to be without subject matter jurisdiction over an action until the plaintiff affirmatively pleads it in his complaint (and proves it upon challenge). *Giancana v. Johnson*, 335 F.2d 366 (7th Cir. 1964), *cert. denied* 379 U.S. 1001 (1965); 5 Wright & Miller *Fed. Prac. & Proc.: Civil* §§ 1206 and 1210 (1969). Gibson's omission is not "a meaningless procedural blunder." (Pet. 10). And his citation of *Foman v. Davis*, 371 U.S. 178, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962), *Conley v. Gibson*, 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957), and 5 Wright & Miller *Fed. Prac. & Proc.: Civil* § 1202 at 60-61 (1969) is wholly inappropriate, for those authorities concern only the sufficiency of statements of claims under FedR.Civ.P. 8(a)(2).

Kroger and the Union specifically pointed out the fatal jurisdictional omissions of Gibson's Complaint and explained how to cure these defects. (R. 8, 10, 16, 23 and 30). And the District Court waited three and one-half months for an amendment to the Complaint adding

the essential jurisdictional prerequisites. (R. 230). Gibson's response was merely to state in a brief that he had satisfied the jurisdictional prerequisites of his claim, attaching a purported EEOC notice of right to sue which had been requested and obtained five and one-half months *after* the commencement of this action. (R. 231). The District Court then waited an additional two months for the essential amendment, which Gibson could have made as of right under 28 U.S.C. § 1653 and Fed.R.Civ.P. 15(a).

When Gibson persisted in his failure to plead the jurisdictional grounds of his claim, the District Court had no choice but to dismiss this action. *Joy v. Hague,* 175 F.2d 395 at 396 (1st Cir. 1949), *cert. denied* 338 U.S. 870 (1949); Fed.R.Civ.P. 8(a)(1), 12(b)(1) and (h)(3), and 41(b). The dismissal of Gibson's action is neither a function of "metaphysical proceduralism" nor an effort by the District Court 'to meet an increasing case load burden.' (Pet. 11 and 13-14). Gibson's memorandum in opposition to dismissal is not a "pleading," Fed.R.Civ.P. 7(a), much less a "complaint," Fed.R.Civ.P. 3 and 8(a), to be construed pursuant to Fed.R.Civ.P. 8(h). And the decisions in *Marlow v. Fisher Body,* 489 F.2d 1057 (6th Cir. 1973), and *Neagle v. Johnson,* 381 F.2d 9 (8th Cir. 1967), consistent with the rules which compelled this dismissal, merely acknowledge that a plaintiff should be allowed to amend his complaint to allege federal question jurisdiction when the record elsewhere indicates that such jurisdiction exists.

Even after the dismissal on October 15, 1973, Gibson had two options which would have saved his claim; he could have moved the District Court for relief from mistake, inadvertance or excusable neglect with leave to amend his Complaint to add the necessary jursdictional

statement, Fed.R.Civ.P. 60(b)(1) and 15(a); or he could have recommenced his civil action with a properly composed complaint, since the dismissal was without prejudice and before the 90-day limitations bar upon his purported right-to-sue notice of August 20, 1973. Fed.R. Civ.P. 41(b) and 42 U.S.C. § 2000e-5(f)(1). Gibson, however, through the person of one of the attorneys representing him upon this Petition for Writ of Certiorari, chose to seek the appeal about which he now complains.

The decision of the Court of Appeals merely explains the jurisdictional prerequisites to commencement of a Title VII action, finds no hardship, excusable neglect or other proper reason for Gibson's noncompliance and observes:

> "This Court should not reverse the judgment of the District Court in view of Gibson's persistent neglect or refusal to pursue the judicial remedies that were available to him. The defendants' motions to dismiss clearly called Gibson's attention to the fatal fault in his complaint: his failure to allege that he had either pursued or exhausted the administrative remedies prescribed in Title VII of the Act. Gibson could have cured the fault as soon as he received his right-to-sue notice simply by amending his complaint to include the necessary allegations and the fact of his receipt of the notice. Fed.R.Civ.P. 15(a)" 506 F.2d at 652.

Not only was there a failure to do this, the further opportunity to refile the action was eschewed, and Gibson elected to pursue the point on appeal, thus allowing his time to run.

CONCLUSION

For the foregoing reasons, Gibson's Petition for a Writ of Certiorari to the Court of Appeals for the Seventh Circuit should be denied.

Respectfully submitted.

CHARLES L. WHISTLER

MICHAEL R. MAINE
Baker & Daniels
810 Fletcher Trust Building
Indianapolis, Indiana 46204

Counsel for Respondent

The Kroger Co.

APPENDIX

Pertinent Text of Statute and Court Rules Involved

United States Code, Title 42, § 2000e-5:

> (a) The [Equal Employment Opportunity] Commission is empowered, as hereinafter provided, to prevent any person from engaging in any unlawful employment practice as set forth in section 2000e-2 or 2000e-3 of this title.
>
> (b) Whenever a charge is filed by or on behalf of a person claiming to be aggrieved * * * alleging that an employer [or] labor organization * * * has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge * * * on such employer [or] labor organization * * * within ten days, and shall make an investigation thereof. * * *
>
> (c) In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under subsection (a) by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated, * * *.
>
> (f)(1) * * * If a charge filed with the Commission pursuant to subsection (b) is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) * * * whichever is later, the Commission has not filed a civil action under this section * * * or the Commission has not entered into a conciliation

agreement to which the person aggrieved is a party, the Commission * * * shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge * * * by the person claiming to be aggrieved * * *.

Federal Rules of Civil Procedure:

8(a). A pleading which sets forth a claim for relief * * * shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, * * *.

12(b). * * * the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, * * *.

12(h). (3) Whenever it appears by suggestion of the parties of otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.

41(b). For failure of the plaintiff * * * to comply with these rules * * *, a defendant may move for dismissal of an action or of any claim against him. * * * a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, * * * operates as an adjudication upon the merits.